no evidence that it was principally devoted to the business of betting. On the contrary. The appellant's own evidence, as I have indicated, has shown that other business was carried on there and that this other business was the principal use to which the room or the desk for that matter was put. (See page 32, also page 33 of the record). The prosecution has not attempted to controvert this and the conclusion I draw is that on this alternative version of the definition of common betting house the prosecution was also destined to fail.

If I am wrong in this, there is another reason why I consider I must allow this appeal.

I indicated at the outset that the charge does not state which portion of these premises was alleged to have been used as a common betting-house. There was as will now be seen a further and more fundamental objection to the charge.

The definition of "common betting-house" in the Ordinance clearly presupposes as I have said the existence of two types of common betting-house within the meaning of the Ordinance — the first being what I will call the "open type" where the public have access and the second being what I will call the "closed type", where the public have no access but where habitual betting is carried on. The prosecution have not made it clear to which type they have referred in the charge and I consider that this omission may well have prejudiced the defence. A consideration of the whole case will indicate what I mean. In the Court below the defence was that the appellant did not have possession of the incriminating documents and knew nothing about them; in this Court, whilst it was admitted that betting was being carried on, it was urged the premises were not a common betting-house within the alternative definition set forth in the Ordinance. Although this apparent confusion on the part of the defence might upon one view of the facts tell against the appellant's case, upon another view it might, and I think should, tell in its favour. The confusion might well have been due to the omission of the prosecution to carry out its duty which was to indicate clearly in the charge the offence or offences which the accused was alleged to have committed.

A consideration of *Li Kim Poat's case*[3] will indicate how the prosecution approached its task in that case. Two charges were laid in the alternative indicating for one thing the particular place or spot at which it was alleged that a common betting-house was being carried on; and for another the charges were laid in the alternative under both portions of the definition; in other words, it was alleged in the alternative that it was an open and that it was a closed common betting-house in the senses in which I have used those terms above.

In conclusion, although these points regarding the charge were not contended for by Counsel for the appellant and although I would thus deal with them not upon the petition but under my powers of revision, I should have been obliged to consider that the trial was unsatisfactory. On both scores, therefore, I hold that the conviction must be quashed. I so order and direct that the fine, if paid, should be refunded.

Appeal allowed.

Solicitors: *Pillai, Lim, Lee & Hwang.*

M. LEE v. R.C.H. LIM & CO.

[C. A. (Whyatt C.J., Hill Ag. C.J. (F.M.) and Knight J.) June 28, 1957]

[Singapore — Civil Appeal No. 31 of 1956]

Practice — Judgment for plaintiffs by consent — Costs — Whether plaintiffs entitled to costs of motion for judgment or only costs of obtaining Order in Chambers — R.S.C., O. 31, r. 6.

Under the Rules of the Supreme Court, 1934, Order 31, r. 6 any party may at any stage of a cause or matter apply to the Court or a Judge for judgment upon admission of fact. The application may be made by way of Motion in open Court or by way of Summons to a Judge in Chambers. But when the defendant consents to the order being made in Chambers, the costs of a Summons only will be allowed except in particular circumstances.

Where the plaintiff proceeds by way of Motion, the Judge, in exercising his discretion as to costs, will not ordinarily allow the plaintiff more than the costs of a summons unless there is some good reason, such as the need for publicity, for the hearing to be in Court rather than in Chambers.

Case referred to:—

(1) *Fox v. Luke* 43 R.P.C. 37.

COURT OF APPEAL.

G. J. Okell for the appellant/defendant.

C. F. J. Ess for the respondents/plaintiffs.

Whyatt C.J. (with whom **Hill Ag. C.J. (F.M.)** and **Knight J.** agreed): — The point for decision in this appeal which is brought by leave is whether this Court should vary an order for costs made by Mr. Justice Whitton on a motion for judgment by which the defendant was ordered to pay to the plaintiffs, in addition to such costs as would have been incurred if the application had been made by summons in chambers, half the difference between the costs of proceeding by

motion and by summons. The facts of the case, so far as they are material, may be briefly summarised. The plaintiffs issued a specially indorsed writ against the defendant claiming $16,349.98 and the defendant in paragraph 1 of his defence admitted liability without qualification for $2,615.50. Thereupon the plaintiffs served a notice of motion on the defendant's solicitors that they intended to move the Court for an order that judgment be entered for the plaintiffs for the sum of $2,615.50 and for the costs of and incidental to the motion. The defendant's solicitors wrote to the plaintiff stating that in their opinion the application could properly and more cheaply be made by way of summons in chambers and they would object to any application for payment of the extra costs occasioned by bringing a motion in open Court. Nevertheless the plaintiffs continued with their motion and in due course the matter came before Mr. Justice Whitton who gave judgment for the plaintiffs for $2,615.50 and in a reserved judgment, awarded the plaintiffs costs on the basis of a summons in chambers plus half the difference between the costs of proceeding by way of motion and by way of summons.

The relevant rule governing applications of this kind is Order 31 r. 6 (which is identical with Order 32 r. 6 of the *Annual Practice*) which provides that an application may be made "to a Court or a Judge". This means that the application may be made by way of motion in open Court or by way of summons to a Judge in chambers and the plaintiffs were therefore clearly entitled under this rule to proceed by either method. It is said, however, that where the defendant consents to the order being made in chambers, the costs of a summons only will be allowed except in particular circumstances, and in support of this view a number of cases mentioned under this rule in the *Annual Practice* are relied upon by the defendant. The effect of these cases is, in my opinion, that where the plaintiff proceeds by way of motion, the Judge, in exercising his discretion as to costs, will not ordinarily allow the plaintiff more than the costs of a summons unless there is some good reason, such as the need for publicity, for the hearing to be in Court rather than in chambers.

The matter is well-illustrated by the case of *Fox v. Luke*[1], which was a passing-off action in which the defendants had consented to judgment, where Tomlin J. expressed himself thus: "In my opinion costs are always in the discretion of the Court. There is, I think, no hard and fast rule that in one class of action the costs of an application in open Court should be allowed, and in another that they should not be allowed. The question in each case is whether it is reasonable and proper to allow it in the particular case. The costs have been allowed in cases which related to patents or trade marks, and in applications by Warrant Holders to restrain the improper use of the term 'Royal Warrant'. That gives some indication of the sort of considerations which may be relevant in determining the question."

Now in the present case, the application was merely for judgment for a sum of $2,615.50 which the defendant admitted owing to the plaintiff and it cannot be and was not suggested that there was any need for a public hearing. The defendant, in his pleading, and again in a letter written by his solicitors, made it abundantly clear that he would submit to judgment for the sum in question if application were made in chambers and there can, I think, be no doubt that the order which the plaintiffs sought could and would have been made by the Judge in Chambers if the plaintiffs had adopted this procedure.

This being so, can it be a proper exercise of the Judge's discretion to order the defendant to pay costs additional to those which would have been incurred on an application in chambers? Mr. Justice Tomlin, in the case to which I have referred, indicated the sort of considerations which may be relevant in determining whether a defendant should be ordered to pay more than the costs of a summons. They are, it will be observed, considerations relating to the particular issues arising in the proceedings. In the present case, the consideration which influenced, indeed determined, the learned Judge's view to award additional costs to the plaintiffs was that the plaintiffs had not embarked on this motion without some grounds of belief that it was the correct course. When the judgment is examined, it is clear that the grounds of belief to which the learned Judge refers are not grounds relating to the issues arising in this particular case but to the general question whether, as a matter of law, an application for judgment on admissions can be made by summons at all. In other words, they were considerations of law of a general character and were not germane to the facts of this particular case. Clearly no question of discretion can arise unless there is available a less expensive procedure by summons but once it is determined as a matter of law that such an alternative exists — and I must confess it seems to me too plain for argument that there is such an alternative — then the question whether costs should be awarded on the basis of a summons or a motion must depend on the facts of the particular case. It was, in my opinion, an irrelevant consideration that the plaintiffs had been in some doubt as to the law prior to the hearing of the motion; all that the learned Judge was entitled to consider when exercising his

discretion was whether, the law being what it is and the plaintiffs therefore having the choice of proceeding by motion or by summons, it was reasonable and proper, to quote the words of Tomlin J. in *Fox v. Luke*[1] *supra*, for the plaintiffs to proceed by way of motion in open Court instead of by the less expensive procedure of summons in chambers. It is clear that the learned trial Judge did not apply his mind to this question at all and consequently there was no real exercise of judicial discretion in this case. It is equally clear that if he had applied his mind to the question, he would have found no materials upon which he could have ordered the defendant to pay more than the costs of proceeding by way of summons.

Accordingly I would propose that the order of the learned Judge in this case be varied by ordering that the defendant pay only such costs as would have been incurred if the application for judgment had been made by summons in chambers. The defendant must have the costs of this appeal.

Such costs fixed at $1,000.00.

Order varied.

Solicitors: *Braddell Bros.; R. C. H. Lim & Co.*

PUBLIC PROSECUTOR v. JOMI

[R. Cr. J. (Smith J.) June 14, 1957]

[Malacca — Criminal Revision No. 6 of 1956]

Criminal Procedure Code (Cap. 21), s. 183(2) — Conditional discharge — No conviction to be recorded.

No conviction should be recorded against a person charged before a Court with an offence punishable by such Court, where the Court finds that the charge is proved, but is of the opinion that the offender should be discharged conditionally on his entering into a bond with or without sureties under the provisions of section 183(2) of the Settlements Criminal Procedure Code. The order in such a case should follow the wording of the section in question.

[**Editorial Note:** section 183 of the Criminal Procedure Code (Cap. 21) in Singapore was repealed by Ordinance No. 27 of 1951, See now section 5 of the Probation of Offenders Ordinance (Cap. 135).]

CRIMINAL REVISION.

L. A. Massie (Federal Counsel) for the appellant.

Respondent in person.

Smith J. : — The accused in this case was charged with the offence of possession of scrap rubber reasonably suspected of being stolen, an offence under regulation 4(1) of the Emergency (Rubber Control) Regulations, 1949, and punishable under Regulation 5(2) thereof.

The learned President found the case against the accused proved and was of opinion that in this case the appropriate course was to bind the accused over in the sum of $500 with two sureties under the supervision of the Probation Officer for one year. The learned President had, however, recorded a conviction and, on conviction, it is obligatory that the Court shall pass a sentence of imprisonment not being less than three months — see Regulation 5(2).

In order to give effect to the order of the learned President, it is necessary that the conviction be varied and that there be substituted therefor a statement that the case against the accused has been proved.

In order to give effect to the bond proposed by the learned President, I varied his order to one discharging the offender conditionally upon her entering into a bond with two sureties to be of good behaviour and to appear for conviction and sentence when called upon at any time during the next one year. This is the appropriate order under section 183(2) of the Straits Criminal Procedure Code when the Court has found that the charge is proved but there are extenuating circumstances.

Order accordingly.

PERUMAL CHETTIAR v. PUBLIC PROSECUTOR

[A. Cr. J. (Good J.) June 28, 1957]

[Ipoh — Criminal Appeal No. 20 of 1957]

Criminal Procedure Code (Cap. 6), ss. 165 & 302(ii) — Where plea of autrefois acquit not available — Possession of stolen property.

This was an appeal against a conviction for an offence under section 6 of the Second-hand Dealers Ordinance, 1946, punishable under section 9. The main ground of appeal was that the Magistrate should have accepted the plea of *autrefois acquit* put forward at the trial, as the accused had been previously tried on a charge under section 29 of the Minor Offences Ordinance, 1955, of being in possession of property reasonably suspected of being stolen and was acquitted.

Held: (1) in this case the plea of *autrefois acquit* was not available to the appellant at his second trial;

(2) possession of the property which was an ingredient of the charge at the first trial was the necessary consequence of the purchase of the property which was an ingredient of the charge at the second trial, but these were two separate and distinct acts so connected together to form the same transaction;

(3) in this case the accused could have been charged at the first trial with both offences under section 165 of the Criminal Procedure Code and therefore section 302(ii) of the Criminal Procedure Code applied and the Magistrate could properly try the accused at the second trial on the charge which was the occasion of the appeal.